

A Tenaga Nasional Bhd v Marwin Industries Sdn Bhd

B HIGH COURT (JOHOR BAHRU) — NO 23NCVC-1 OF 2011
VERNON ONG J
31 OCTOBER 2011

C *Evidence — Burden of proof — Shifting of — Evidential burden of proof on plaintiff — Burden of establishing case — Burden of introducing evidence — When does evidential burden of proof shift to defendant — Evidence Act 1950 s 101(1)*

D *Public Utilities — Electricity — Electricity payment — Tampering of test terminal block in meter room causing recording of electricity usage to be lower than actual usage — Whether tampering of meter proven by plaintiff — Defence of bare denial by defendant — Whether plaintiff entitled to claim for loss of revenue and expenses incurred — Whether calculation of plaintiff's claim accurate — Electricity Supply Act 1990 s 38(3)*

E

On 3 September 2009, the plaintiff's employees carried out a routine inspection on the installation of the electricity meter at the defendant's factory. They discovered that the test terminal block ('TTB') in the meter room had been tampered with, in particular, the seal bits on the meter cage and panels were fakes, and a foreign blue wire had been used as a bypass on wire S1 and S2 in the TTB for the red, yellow and blue phases. The plaintiff thus claimed against the defendant for loss of revenue of RM1,940,208.64 for the period between December 2007 to September 2009 due to alleged tampering of the electricity meter. The defendant denied any knowledge of the alleged tampering and also disputed the computation of the loss of revenue contending that it was in fact a back billing by the plaintiff.

H **Held**, allowing the plaintiff's claim with costs:

(1) In law, the party who desires the court to give judgment as to any legal right or liability bears the burden of proof (s 101(1) of the Evidence Act 1950). The burden of proof is on that party is two fold: (i) the burden of establishing a case; and (ii) the burden of introducing evidence. The burden of proof lies on the party throughout the trial. The evidential burden of proof is only shifted to the other party once that party has discharged its burden of proof. If that party fails to discharge the original burden of proof, then the other party need not adduce any evidence. In this respect it is the plaintiff who must establish its case. If the plaintiff

I

fails to do so, it will not do for the plaintiff to say that the defendant has not established its defence (see para 6).

A

- (2) There must be some preponderance in the plaintiff's favour at the conclusion of the whole case. Even if the plaintiff establishes a prima facie case, but at the conclusion of the trial the court finds that the position is exactly even, then any preponderance in favour of the plaintiffs will cease to exist. If that happens, then the plaintiff has failed to discharge the burden of proof which is upon it, and the plaintiff must necessarily fail (see paras 6–7).

B

- (3) The plaintiff had satisfied the burden of proof of establishing its case and introducing evidence. There was clear and incontrovertible evidence that the meter had been tampered with. Accordingly, the burden of proof shifted to the defendant. The only evidence in rebuttal was that of the defendant's factory manager ('DW2'). DW2 said that he did not know if the meter had been tampered with. He denied tampering with the meter. The only answer to the plaintiff's case was a bare denial on the part of the defendant. The defendant had failed to discharge the evidential burden of proof necessary to rebut the plaintiff's case. The evidence establishing the fact that the TTB had been tampered with was incontrovertible (see paras 8–9).

C

D

E

- (4) Section 38(3) of the Electricity Supply Act 1990 provides that in the event of any tampering, the plaintiff shall be entitled to require the defendant to pay for the loss of revenue and any expenses incurred by the plaintiff (see para 11).

F

- (5) The defendant had failed to show that there was any manifest error on the face of the statement produced by the plaintiff showing the monthly average consumption calculated from 26 April 2003 to 3 September 2009. The defence failed to raise any question on the method of calculation or on the accuracy of the statement (see para 14–15).

G

[Bahasa Malaysia summary]

Pada 3 September 2009, pekerja-pekerja plaintiff menjalankan pemeriksaan rutin atas pemasangan meter elektrik di kilang defendan. Mereka mendapati bahawa blok terminal ujian ('TTB') di dalam bilik meter telah diusik, terutamanya, pengedap di atas sangkar meter dan panel-panel adalah palsu dan wayar biru yang asing telah digunakan sebagai pintasan atas wayar S1 dan S2 di dalam TTB untuk fasa merah, kuning dan biru. Plaintiff oleh itu menuntut terhadap defendan untuk kerugian hasil sebanyak RM1,940,208.64 untuk tempoh di antara Disember 2007 hingga September 2009 akibat usikan yang didakwa terhadap meter elektrik tersebut. Defendan menafikan apa-apa pengetahuan mengenai usikan yang didakwa tersebut dan juga

H

I

- A mempertikaikan pengiraan kerugian hasil dengan berhujah bahawa ia sebenarnya merupakan bil lama plaintif.

Diputuskan, membenarkan tuntutan plaintif dengan kos:

- B (1) Dari segi undang-undang, pihak yang menginginkan mahkamah memberi penghakiman terhadap apa-apa hak dari segi undang-undang atau liabiliti menanggung beban pembuktian (s 101(1) Akta Keterangan 1950). Beban pembuktian adalah atas pihak tersebut adalah dua bahagian: (i) beban membuktikan kes; dan (ii) beban mengemukakan keterangan. Beban pembuktian terletak di atas sepanjang masa perbicaraan. Beban pembuktian yang jelas hanya berpindah kepada pihak satu lagi apabila sahaja pihak melepaskan beban pembuktiannya. Jika pihak tersebut gagal untuk melepaskan beban pembuktian asal, dengan itu pihak yang satu lagi tidak perlu mengemukakan apa-apa keterangan. Dalam perkara ini plaintif lah yang mesti membuktikan kesnya. Jika plaintif gagal berbuat sedemikian, plaintif tidak boleh menyatakan yang defendan tidak membuktikan pembelaannya (lihat perenggan 6).
- C (2) Mesti terdapat sesuatu kepentingan memihak plaintif pada akhir keseluruhan kes. Jika plaintif dapat membuktikan kes *prima facie*, tetapi pada akhir perbicaraan mahkamah mendapati bahawa kedudukan adalah sama, oleh itu apa-apa kepentingan memihak plaintif akan terhenti wujud. Jika ini berlaku, plaintif gagal untuk melepaskan beban pembuktian yang mana di atasnya, dan plaintif semestinya gagal (lihat perenggan 6–7).
- D (3) Plaintif memenuhi beban pembuktian untuk membuktikan kesnya dan mengemukakan keterangannya. Terdapat keterangan yang jelas dan tidak dapat dipertikaikan bahawa meter telah diusik. Oleh itu beban pembuktian berpindah kepada defendan. Satu-satunya keterangan untuk mematahkan adalah keterangan pengurus kilang defendan ('DW2'). DW2 menyatakan dia tidak tahu jika meter telah diusik. Dia menafikan mengusik meter tersebut. Satu-satunya jawapan kepada kes plaintif adalah penafian kosong oleh pihak defendan. Defendan telah gagal untuk memberikan beban pembuktian yang jelas untuk mematahkan kes plaintif. Keterangan yang membuktikan fakta bahawa TTB telah diusik adalah tidak dapat dipertikaikan (lihat perenggan 8–9).
- E (4) Seksyen 38(3) Akta Bekalan Elektrik 1990 memperuntukkan bahawa jika terdapat apa-apa usikan, plaintif berhak untuk menghendaki defendan membayar kerugian hasil dan apa-apa pembelanjaan yang ditanggung oleh plaintif (lihat perenggan 11).
- F (5) Defendan telah gagal untuk menunjukkan bahawa terdapat apa-apa kesilapan jelas atas muka pernyataan yang dikemukakan plaintif
- G
- H
- I

menunjukkan penggunaan purata bulanan yang dikira dari 26 April 2003 hingga 3 September 2009. Pembelaan gagal untuk membangkitkan apa-apa soalan atas cara pengiraan atau atas ketetapan pernyataan (lihat perenggan 14–15).]

A

Notes

B

For cases on electricity in general, see 10 *Mallal's Digest* (4th Ed, 2011 Reissue) paras 2188–2197.

For cases on shifting of burden of proof, see 7(1) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 717–729.

C

Cases referred to

Abrath v North Eastern Railway Co (1883) 11 QBD 440, CA (refd)

PP v Mohamed Kassin bin Yatim [1977] 1 MLJ 64 (refd)

Selvaduray v Chinniah [1939] MLJ 253 (refd)

D

Legislation referred to

Electricity Supply Act 1990 s 38(3), (4), (5)

Evidence Act 1950 ss 101(1), 102

Izatunlina bt Jamaludln (Abdul Rahim bin Ali with him) (Sharizat Rashid & Lee) for the plaintiff.

E

Shaharudin (Ibrahim Haikal with him) (Hanif & Co) for the defendant.

Vernon Ong J:

F

[1] The plaintiff's claim against the defendant is for loss of revenue due to alleged tampering of the electricity meter at the defendant's factory premises.

THE PLAINTIFF'S CASE

G

[2] On 3 September 2009, the plaintiff's employees carried out a routine inspection on the installation of the electricity meter at the defendant's factory. They discovered that the test terminal block ('TTB') in the meter room had been tampered with, in particular, the seal bits on the meter cage and panels were fakes, and a foreign blue wire had been used as a bypass on wire S1 and S2 in the TTB for the red, yellow and blue phases. The plaintiff is claiming for loss of revenue of RM1,940,208.64 for the period between December 2007 to September 2009.

H

I

THE DEFENDANT'S DEFENCE

[3] The defendant's pleaded case is mounted on two planks. Firstly, it is contended that it has no knowledge of the alleged tampering. Secondly, the

- A defendant disputes the computation of the loss of revenue and contends that it is in fact a back billing by the plaintiff.

FINDINGS OF THE COURT

- B [4] The following witnesses were called by the parties at the trial:
- (a) PW1 – Encik Mohd Afham bin Mohd Latiff (*tukang teknik biasa*);
 - (b) PW2 – Cik Siti Hawa bt Ahmaddariri (*juruteknik tingkatan biasa*);
 - C (c) PW3 – Encik Ramesh a/l Thangeveloo (Pengurus SEAL Zon Selatan TNB);
 - (d) DW1 – Encik Anantha Kumar Achu (*jurutera elektrik*); and
 - (e) DW2 – Encik Johari bin Hassim (*pengurus kilang*).

- D [5] It was agreed that the only issues for determination relate to the question of whether the plaintiff's TTB at the defendant's factory had been tampered with; and if so, whether the plaintiff is entitled to recover the loss of revenue and any expenses incurred by the plaintiff due to the tampering of the TTB?

E *Whether the plaintiff's test terminal block at the defendant's factory has been tampered with?*

- F [6] In law, the party who desires the court to give judgment as to any legal right or liability bears the burden of proof (s 101(1) of the Evidence Act 1950). The burden of proof is on that party is twofold: (i) the burden of establishing a case; and (ii) the burden of introducing evidence. The burden of proof lies on the party throughout the trial. The evidential burden of proof is only shifted to the other party once that party has discharged its burden of proof. If that party fails to discharge the original burden of proof, then the other party need not adduce any evidence. In this respect it is the plaintiff who must establish its case. If the plaintiff fails to do so, it will not do for the plaintiff to say that the defendant has not established its defence (*Selvaduray v Chinniah* [1939] MLJ 253 (CA); s 102 of the Evidence Act 1950). It should also be noted that there must be some preponderance in the plaintiff's favour at the conclusion of the whole case. Even if the plaintiff established a prima facie case, but at the conclusion of the trial the court found that the position was exactly even, then any preponderance in favour of the plaintiffs had ceased to exist. If that happens, then the plaintiff has failed to discharge the burden of proof which is upon it, and the plaintiff must necessarily fail (*Abrath v North Eastern Railway Co* (1883) 11 QBD 440, 452 (CA)).

- I [7] PW2 visited the defendant's factory on 3 September 2009 and conducted

a routine inspection on the installation of the meter. PW2 found evidence of tampering of the meter. The seal bits at the meter cage and meter panel were counterfeits (exhs P1(M), P1(N) and P4). The seal bits at the TTB were missing (exh P1(G)). A foreign blue wire tied with a yellow wire had been used as a bypass at the TTB (exhs P1(F) and P6). PW2 also found that the foreign blue wire was tied to a window next to the meter panel (exhs P1(U) and P1(V)). PW2 removed the foreign wire at the TTB and resealed the installation of the meter and the meter cage. PW2 then recorded her findings in the 'Borang Pemeriksaan Meter LPC Voltan Rendah' (exh P2). The defendant's representative DW2 who was present also signed on the said Borang as witness to PW2's findings. Despite extensive cross-examination by defence counsel, PW2's evidence was consistent and unshaken. PW2 came across as a credible witness. PW2's evidence was also corroborated by PW1 who was present and who took photographs of the evidence.

[8] On the totality of the evidence, the court finds that the plaintiff has satisfied the burden of proof of establishing its case and introducing evidence. There was clear and incontrovertible evidence that the meter had been tampered with. Accordingly, the burden of proof shifted to the defendant. The only evidence in rebuttal is that of the defendant's factory manager ('DW2'). DW2 said that he did not know if the meter had been tampered with. He denied tampering with the meter. He also said that he was not present during the inspection, he did not see the foreign blue wire, and that he signed the said Borang because PW2 asked him to.

[9] The only answer to the plaintiff's case is a bare denial on the part of the defendant. The defendant has failed to discharge the evidential burden of proof necessary to rebut the plaintiff's case. The evidence establishing the fact that the TTB had been tampered with is incontrovertible. In the circumstances, the question must be answered in the affirmative.

If so, whether the plaintiff is entitled to recover the loss of revenue and any expenses incurred by the plaintiff due to the tampering of the test terminal block?

[10] According to PW3, the computation of the loss of revenue was based on the average consumption of six months prior to 3 September 2009. PW3 produced a statement (exh P8) showing the monthly average consumption calculated from 26 April 2003 to 3 September 2009. Using a graph (exh P9) PW3 explained that the consumption of electricity at the defendant's factory had dropped abruptly from 4 December 2007 until 3 September 2009. The back billing period charged was for the six month period during which the consumption of electricity had dropped abruptly.

[11] Section 38(3) of the Electricity Supply Act 1990 provides that in the

- A event of any tampering, the plaintiff shall be entitled to require the defendant to pay for the loss of revenue and any expenses incurred by the plaintiff. Under sub-s (4), the statement produced by PW3 shall be prima facie evidence of the payment that has to be made by the defendant. As the statement constitutes prima facie evidence of the payment due to the plaintiff, it falls upon the
- B defendant to rebut this prima facie evidence. Such amount due shall be recoverable by civil action in court pursuant to sub-s (5).

- C [12] In rebuttal, DW2 said that the defendant's factory did not consume a lot of electricity. There were two sections in the factory, one for injection moulding and the other for assembly and packing. In 2007, there were 52 factory workers, 47 in 2008 and 50 in 2009. The defendant's factory closed on public holidays and on Sundays. DW2 also said that the production depended on orders received. Under cross-examination, DW2 said that there were ten to
- D 15 machines in the defendant's factory for the back billing period. The machines operated 24 hours a day. DW2 could not produce the factory's production record for the back billing period to support his contention of low consumption.

- E [13] In further rebuttal, the defendant also called DW1 an electrical engineer to give expert evidence. However, the court is not satisfied that DW1 is an expert witness. Even though he is a qualified electrical engineer, he is by his own admission not skilled in managing accounts and back billings. Further, DW1 had never given any expert opinion in court. Under cross-examination, DW1
- F agreed that he has never attended any course organised by the plaintiff on the computation of back billing. DW1 did not come across as an independent witness. He appeared to be an advocate for the defendant's case. What DW1 purports to do is merely to question PW3's method of computation. DW1 did not know what methods were used to calculate back billings. Even if DW1's
- G expert opinion is accepted, the evidentiary value of DW1's evidence can never go beyond an opinion and can never be of absolute certainty (see *Public Prosecutor v Mohamed Kassin bin Yatim* [1977] 1 MLJ 64).

- H [14] In comparison, PW3 has been working with the plaintiff for 15 years. PW3 was responsible for managing the accounts and consumer's back billings. PW3 explained that the method of calculation of the back billing was based on the average consumption over a period of six months prior to 3 September 2009; which period coincided with the sudden drop in electricity consumption at the defendant's factory. The defendant has failed to account for the sudden
- I drop in electricity consumption for the period in question.

[15] In conclusion, the court finds that the defendant has failed to show that there was any manifest error on the face of the statement. Secondly, the evidence of DW1 and DW2, even if accepted at face value fails to raise any

question on the method of calculation or on the accuracy of the statement. In the premises, the question is answered in the plaintiff's favour. A

[16] For the foregoing reasons, the plaintiff's claim is allowed in prayers (a), (b) interest at 4%pa commencing from the date hereof to the date of satisfaction and costs of RM15,000. B

Plaintiff's claim allowed with costs.

Reported by Kanesh Sundrum C

D

E

F

G

H

I